SUPREME COURT, U. S.

IN THE

MAY 4 1967

Supreme Court of the United States

October Term, 1967

No. ~~1~~ 128

JEROME L. DOFF, *et al.*,

Petitioner,

vs.

BRUNSWICK CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

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No. .....

JEROME L. DOFF, *et al.*,

Petitioner,

vs.

BRUNSWICK CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming a summary judgment of the United States District Court for the Southern District of California, Central Division, entered on December 28, 1966.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported. A copy of the opinion is attached as an appendix to this petition.

Jurisdiction.

The judgment of the Court of Appeals [T. R. p. 372; Appendix "A"] was entered on December 28, 1966. Petition for rehearing was denied on February 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

Questions Presented.

1. Whether the failure of a Circuit Court of Appeals to *read* in full or in part the written testimony and written argument of a petitioner on appeal from an order granting summary judgment, where the Court confined itself to examination of the contents of said written testimony in forming its opinion, constitutes a deprivation of a fair and full hearing to petitioner and therefor a deprivation of due process of law in violation of the Fifth Amendment to the Constitution.

2. Whether the failure of a Circuit Court of Appeals to *consider* in full or in part the written testimony and written argument of a petitioner on appeal from an order granting summary judgment, where the Court confined itself to consideration of the contents of said written testimony in forming its opinion, constitutes a deprivation of a fair and full hearing to petitioner and therefor a deprivation of due process of law in violation of the Fifth Amendment to the Constitution.

Constitutional Provisions.

Amendment V, Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case.

This is an action based in contract arising out of two written agreements. The first, a Purchase Agreement entered into in March, 1962, between the shareholders of Transa Structures, Inc. (hereinafter "Transa"), as sellers, and Brunswick Corporation (hereinafter "Brunswick"), as buyers, for the purpose of Brunswick acquiring 100% of the stock of Transa. The second, a Loan Agreement, was contemporaneously entered into between Transa and Brunswick. By the terms of said Loan Agreement, Brunswick agreed to make to or obtain for Transa loans aggregating not more than $600,000.00 for the purpose of providing working capital for the manufacture and fabrication of a novel product produced by Transa (*i.e.*, a collapsible structure designed for housing, schooling and other similar purposes). Jerome L. Doff and Mildred C. Doff (hereinafter "Doffs"), petitioners herein, executed a Guarantee Agreement for the purpose of guaranteeing loans made to Transa under said Loan Agreement.

Said Loan Agreement provided as a condition precedent, that the aggregate of loans made to or obtained for Transa by Brunswick must be secured by assignment to Brunswick of all sums due or to become due to Transa by reason of Transa's contracts with the United States Department of the Interior (hereinafter "Interior Contract") and with various school districts in the State of California (hereinafter "California Contracts").

Transa commenced production under its Interior and California Contracts on the basis of a series of bank loans obtained for Transa by Brunswick in the aggregate amount of $470,000.00.

Said Loan Agreement further provided that all of the proceeds of all of Transa's contracts need *not* be assigned to Brunswick or lender prior to Transa's requesting any loan segment of the aforesaid maximum of $600,000.00, if the amount of the requested loan, together with all the outstanding loans already made, did not exceed the moneys due and to become due under proceeds which Transa had already assigned. There was the additional proviso that all proceeds, however, must be assigned to Brunswick or lender prior to May 15, 1962.

At a point prior to May 15, 1962, Transa, requiring additional capital with which to complete its obligation under the Interior Contract and the California Contracts, requested Brunswick for a further loan. At this time, Transa had already assigned all of the sums to become due under the Interior Contract and a portion of the sums to become due under the California Contracts to Brunswick. Brunswick refused to make or arrange for a loan to Transa upon Transa's request as stated above, with the result that Transa was unable to complete its obligations under the Interior Contract and California contracts; became subject to litigation under its completion and performance bonds; and subsequently went into bankruptcy.

Suit was filed herein by Brunswick on December 20, 1963 naming appellants Jerome L. Doff and Mildred C. Doff as defendants therein. The basis of said suit was the alleged failure of Transa to make re-

payment of loans arranged by Brunswick under said Loan Agreement and the failure of Doff to fulfill their alleged obligations under said Guarantee Agreement.

Answer was filed by Doffs on February 25, 1964 [T. R. p. 41] and, upon motion [T. R. p. 106] Doffs filed an Amended and Supplemental Answer and Counterclaim on July 21, 1964. [T. R. p. 230.] The basis of said counterclaims was that Brunswick's failure to fulfill its obligations under said Loan Agreement was a breach of said agreement causing the insolvency of Transa and Transa's resulting inability to repay said loans; that said breach obviated Doffs' obligations under said Guarantee Agreement; and that Brunswick's failure to purchase Doffs' shares of stock in Transa pursuant to the terms and conditions of said Purchase Agreement constituted a breach of said agreement causing damage to Doffs in the sum of $1,000,000.00.

Brunswick's Motion for Summary Judgment was filed on July 20, 1964. [T. R. p. 109.] Said motion was heard on August 3, 1964 and on August 10, 1964, and summary judgment in favor of Brunswick, based upon the Court's Findings of Fact and Conclusions of Law [T. R. p. 330], was filed and entered on August 21, 1964. [T. R. p. 336.]

Argument upon the motion for summary judgment was based upon Brunswick's assertion that there was no genuine issue of fact to be determined by the Court,

in that Brunswick's allegations of default by Transa of the terms and conditions of said Loan Agreement were not controverted by Doffs and that said alleged default automatically made Doffs liable under said Guarantee Agreement, thereby providing ground for summary relief.

In reply, Doffs asserted that said alleged default was, in fact, clearly and sufficiently controverted by Doff's [in that Brunswick, had committed a prior breach which excused the subsequent alleged default of Transa], by affidavit, and that, therefore, there was a genuine and substantial issue of fact presented with regard to the allegation of default and, further, that there were equally substantial and genuine issues of fact presented by affidavit with respect to other matters having to do with the entire said transaction between Brunswick and Transa, as said transaction related to Doffs. [Supplemental T. R.]

The District Court ruled in favor of Brunswick's assertions as to lack of controversy on the allegation of default by Transa, dismissed Doffs' counterclaim on the basis that said counterclaim was without merit in view of the Court's finding of default, and granted summary judgment in favor of Brunswick.

Thereafter, a motion supported by affidavit was filed by Doffs on September 25, 1964 [T. R. p. 342] requesting the Court to reconsider its ruling for summary judgment. The Court did not conduct any hearings on this motion. Appeal followed to the Circuit Court of Appeal. [T. R. p. 359.]

The Circuit Court affirmed the decision below on December 28, 1966. Petition for rehearing was denied on February 3, 1967. Hence, this petition.

Reasons for Granting the Writ and Argument Amplifying Same.

This case presents a question going to the very marrow of our democratic system. Certiorari should be granted to determine whether or not an intermediate appellate court may, with impunity, deny due process to a litigant by the court's *failure to read,* or having read, it's *failure to assimilate* the written evidence submitted and upon which the court must, in a matter arising out of a summary judgment proceeding, solely rely in arriving at its decision. It should be determined if a full and fair hearing is possible under circumstances which clearly demonstrate that a Court of review has not read or assimilated the record before it.

If it *is* possible for an intermediate appellate court to circumvent its duty, both moral and ethical, to thoroughly and completely consider the written record before it in making its decision, then there exists a gap in our democratic system of legal procedure through which the rights guaranteed under our Federal Constitution may flow and be dissipated without impediment.

Ordinarily, it is not feasible to determine whether or not a court has read in whole or in part the written evidence submitted for consideration, and even less possible to ascertain the extent of assimilation of that which has been read. This matter is unique in that the language of the intermediate appellate court's opinion serves as its own indictment of failure to read the written evidence before it by calling attention to the purported absence of a pivotal fact which was clearly contained in the written evidence.

This matter, a summary judgment proceeding, was submitted to the District Court upon affidavits. The

Circuit Court of Appeals in forming its opinion, stated, ". . .; *we are confined to an examination of the contents of these affidavits.*" [T. R. p. 373]. (Emphasis added.) The Circuit Court's failure to read or failure to consider and assimilate all of the content of said affidavits precipitates this petition.

The pivotal fact which was purportedly omitted from petitioner's affidavit related to petitioner's demand and when said demand was made of Brunswick. The Circuit Court stated [T. R. p. 373]:

> "The District Court found that Transa had committed two defaults under the loan agreement, one on May 15, 1962, the other on May 23, 1962. Since the Doffs assert that Brunswick was the first party in breach, the date of Transa's demand for a further loan is *crucial.*
>
> Jerome Doff's affidavit is sufficiently *vague* to leave this matter in *doubt.* In it he says: *'I know of may own knowledge* that Transa's demand on Brunswick for the balance of $130,000 was made prior to May 23, 1962. . . .' (Emphasis added). This allegation was never denied by respondents. Accordingly, it must be taken as true and Brunswick cannot rely upon the default of May 23 to excuse its obligation to loan the $130,000."

The Circuit Court, as indicated above, recognized that the date of Transa's demand for a further loan was "*crucial*" (Emphasis added). The Circuit Court then goes on to state "Jerome Doff's affidavit is sufficiently *vague* to leave this matter in *doubt.*" (Emphasis added.)

Had the Circuit Court thoroughly read and assimilated all of the written evidence before it, it would

have found the following statement in Doff's affidavit of September 25, 1964 [T. R. p. 342]:

> "I *personally requested* Brunswick to advance these additional funds *prior to May 15, 1962,* and they refused to do so. At no time did Brunswick ever inform me that the reason they refused to loan the balance of the funds was because of Transa's default." (Emphasis added.)

It is submitted that any reasonable reader would not, having read the foregoing statement, conclude that it was "vague" as to establishing that a demand had been made *prior* to *both* May 15, 1962 and May 23, 1962; nor would the statement leave a reasonable reader "in doubt" as to whether or not an averment had been made regarding said demand.

It must therefore be concluded that the Circuit Court either did not read the said statement in Doffs' affidavit at all, or, having read it, did not understand the plain meaning of the language therein contained.

The Circuit Court states in its opinion [T. R. p. 373] that Doffs' allegations of demand for $130,000 prior to May 23, 1962, were never denied by Brunswick and therefore Brunswick was precluded from relying upon any alleged default of Transa on May 23, 1962 to excuse Brunswick's obligation to loan the $130,000. The Circuit Court thereby disposed [by holding the District Court committed error] of the first matter it conceded was in issue. As Doff's allegation of demand *prior* to May 15, 1962 was never denied by Brunswick either, then it follows that Brunswick was also precluded from relying upon the alleged default of May 15, 1962 to excuse its obligation to loan the $130,000 at the time of demand, *i.e.*, prior to May 15, 1962. This should have disposed of the

second matter conceded by the Circuit Court to be in issue, thereby reversing the lower court's decision. However, the Circuit Court's failure to read or understand what it had read relating to the pivotal fact of whether or not an averment of personal demand had been made prior to May 15, 1962, led it to try to find some *other* reason for permitting an issue of prior breach by Brunswick to be raised. After strained and tortuous reasoning [T. R. p. 374 *et seq.*] the Circuit Court concluded that there was none and affirmed the lower court's decision. The Circuit Court of Appeal's opinion [and in error] is specious on the facts the Court mistakenly considered; it must be completely discounted having not considered the true facts raised by affidavit.

In at least two other instances, the language of the Circuit Court clearly demonstrates its *failure to read or, having read, understand* the plain meaning of the averment in Doffs affidavit quoted above. In its opinion, the Court states [T. R. p. 374] that ". . . Doff's statement that the demand was made "prior to May 23, 1962" should be read *liberally*". Obviously, that particular statement would not have to be read "liberally" if the Court was aware of Doffs averment contained in his affidavit. In yet another place in the opinion [T. R. p. 376], the Circuit Court made a point of singling out a part of Doff's affidavit which read ". . . I had *no personal knowledge of the facts* concerning the performance of Transa Structures, Inc. of its obligations under the Loan Agreement, . . ."

The Court concluded that this statement was sufficient to "devitalize" (*ibid.*) Doff's affidavit. Had the Court read on a little further, or assimilated what was subsequently contained in said affidavit, it would have discovered the statement regarding Doff's *personal* knowledge of the facts to which Doff *could* testify, *e.g., the time of demand,* which demand occurred at a time that no default by Transa existed and Transa's performance not challenged by Brunswick under the Loan Agreement.

In addition, *Doff's Reply Brief* [D. 3, Reply Brief of Appellant] before the Circuit Court set forth Doff's statement above regarding personal knowledge of demand made prior to May 15, 1962, and it would appear that there, again, the Court either did not read the Reply Brief, or, having read it, did not understand the plain meaning of the language therein contained.

The Circuit Court's subsequent concern with Section 5 of the Loan Agreement [T. R. p. 373] becomes moot because Brunswick was not in a position to claim default by Transa under said section *until* May 15, 1962. As Doff stated he made demand *prior* to May 15, 1962 [T. R. p. 342], that said demand was refused and, further, that Brunswick never stated that such refusal was based upon any default by Transa; *and inasmuch as Brunswick has never denied these allegations,* it must be concluded that a genuine issue of fact has always existed in this matter. The Circuit Court has denied petitioners their rightful day in court on this issue of fact.

The question of what constitutes a fair and full hearing within the meaning of the due process clause of the Fifth Amendment of the United States Constitution was raised and decided with respect to written evidence in *National Labor Relations Board v. Botany Worsted Mills,* 106 F. 2d 263, 265. Therein it was held:

> "It is both obvious and well settled by authority that the one who decides must hear or, in the case of written testimony, *read,* Morgan v. United States, 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288." (Emphasis added.)

The Court, in the same case, went on to state:

> "The United States Supreme Court does not seem to share the cynicism of a writer in the Yale Law Journal who said: "* * * No one has dared suggest that litigants may impeach the decision of judges of intermediate appellate courts on the ground that they have not read the record made before a lower court. No lawyer is naive enough to believe that judges actually read through the records in the cases before them".

Conclusion.

In this case, the petitioners *do* have the timerity to [respectfully] suggest that litigants may impeach the decision of judges of intermediate appellate courts for failure to read or reasonably understand and therefore consider the written evidence in the case before them.

The written evidence which the Circuit Court failed to read in this case was evidence of vital importance

to the ultimate determination of the summary judgment proceeding under review and prejudicial to petitioners position. Failure of the Circuit court herein constitutes an abridgment of petitioners' rights under the Fifth Amendment of the United States Constitution in that a full and fair hearing was not accorded to petitioners in this case. Due process has been circumvented.

Respectfully submitted,

JEROME L. DOFF,
In Propria Persona.

APPENDIX "A".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Jerome L. Doff, et al., Appellants, vs. Brunswick Corporation, Appellee. No. 20,192.

[December 28, 1966]

Appeal from the United States District Court for the Southern District of California. Central Division.

Before: Barnes and Koelsch, Circuit Judges, and Taylor, District Judge.

Koelsch, Circuit Judge.

Brunswick Corporation brought his diversity action to recover the unpaid balance due under certain loans by Brunswick to Transa Structures, Inc. and guaranteed by appellants Jerome and Mildred Doff. The District Court granted summary judgment on the guaranty. This appeal followed.

In March 1962 Brunswick signed a loan agreement with Transa by the terms of which Brunswick agreed to make or obtain loans for Transa up to an aggregate sum of $600,000. Brunswick arranged for over $470,000 in loans to Transa, none of which was repaid at maturity. Accordingly, it sued the Doffs as guarantors of the notes.

The Doffs contend that Transa (and through it the Doffs) has a valid defense to this action because Brunswick had breached the loan agreement by refusing to loan Transa, upon demand, sums in excess of $470,000. Brunswick rejoins that it was relieved of its

obligation to loan the entire $600,000 by Transa's prior default on certain conditions precedent to obtaining a loan. The Doffs counter with the assertion that, even if some of these conditions were not fulfilled, Transa made a demand for the $130,000 before any of Transa's alleged defaults and thus it was Brunswick that committed the first breach.

In addition to opposing Brunswick's claim for the money allegedly due under the guaranty, the Doffs counterclaimed for damages caused by Brunswick's failure first to loan the full $600,000 to Transa and second to purchase the Doff's shares of stock in Transa pursuant to a purchase agreement incorporated into the loan agreement heretofore described.

The District Court determined that there was no genuine issue as to any material fact in that respondent's allegations of default by Transa were never controverted by appellants and that the alleged default automatically made appellants liable under their guaranty. Moreover, the court dismissed the counter-claim on the ground that the purported purchase agreement was an option rather than a consummated sale.

The matter was submitted to the District Court upon affidavits as provided in Rule 56(e) of the Federal Rules of Civil Procedure. As a result neither party may rest upon the mere allegations or denials in its pleadings; we are confined to an examination of the contents of these affidavits, See *e.g., First National Bank v. First Bank Stock Corp.,* 306 F.2d 937, 943 (9th Cir. 1962).

The District Court found that Transa had committed two defaults under the loan agreement, one on May 15, 1962, the other on May 23, 1962. Since the Doffs

assert that Brunswick was the first party in breach, the date of Transa's demand for a further loan is crucial.

Jerome Doff's affidavit is sufficiently vague to leave this matter in doubt. In it he says: "I know of my own knowledge that Transa's demand on Brunswick for the balance of $130,000 was made *prior to* May 23, 1962. . . ." (Emphasis added). This allegation was never denied by respondents. Accordingly, it must be taken as true and Brunswick cannot rely upon the default of May 23 to excuse its obligation to loan the $130,000.

This leaves only the asserted default under section 5 of the loan agreement, which provides in part pertinent here:

> "5. All of the following conditions precedent must have occurred prior to the making of any loans under this loan agreement;
>
> . . .
>
> 5.2 Transa shall have assigned or caused to be assigned to Brunswick, or to the other lender hereunder . . . all sums due and to become due to Transa . . . in connection with the California Contracts (which shall include at least thirty (30) units) . . . provided, however, that, except as hereinafter provided, all of the foregoing contracts need not be assigned, prior to any requested loan, if the amount of the requested loan, together with all the outstanding loans hereunder, does not exceed the moneys due and to become due under such of the foregoing contracts as have been assigned as aforesaid. . . . In any event all of the foregoing contracts shall be assigned to Brunswick or such other lender prior to May 15, 1962 as security for all loans hereunder."

In one of its moving affidavits Brunswick claims that "by June 15, 1962 said Transa Structures, Inc. was and for some time had been in default," since "section 5.2 of said loan agreement required the proceeds of the sale of at least thirty units of the California Contracts to be assigned to the lender prior to May 15, 1962, but the number of units sold and assigned prior to May 15, aggregated less than nine units. . . ."

It is clear from reading section 5.2 that if Transa's demand was made after May 15, Transa was already in default because at least thirty units had to be assigned "in any event," by that date. However, since the affidavits of the party opposing summary judgment should be indulgently treated, [*United States v. Western Electric Co.*, 337 F.2d 568, 575 (9th Cir. 1964)], Doff's statement that the demand was made "prior to May 23, 1962" should be read liberally. Thus, for the purposes of argument, Transa's demand was made prior to May 15, the date which triggered the "in any event" clause.

Now we come to the crux of the matter: Was Transa entitled to a loan of $130,000 from Brunswick prior to May 15? Under the terms of the loan agreement Transa's right to obtain a loan was expressly conditioned upon the prior assignment of the sums due under at least thirty units of the California Contracts. But Brunswick alleged that only nine such units had been assigned. However, the requirement that thirty units be assigned could itself be excused if the moneys due under those units which had been assigned exceeded the amount of the requested loan together with all the outstanding loans previously made.

Even though it is possible that, by reason of the above provisions, Transa had fulfilled all its obligations prior to demand, the District Court ruled that there was no genuine issue of fact because Doff never controverted Brunswick's allegation of default.

Appellants contend that they did put the question of default into issue. But Doff's counter-affidavit is so vague that even under the rule of liberal construction of a counter-affiant's papers we would have to strain to hold that it suggests a denial of default. More is required from an affiant than mere hearsay and legal conclusion.[1] *Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F.2d 347 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Washington v. Maricopa County*, 143 F.2d 871 (9th Cir. 1944), *cert. denied*, 327 U.S. 794 (1946).

In any event, we find it unnecessary to indulge in such verbal contortions. In his affidavit supporting a motion to reconsider the order granting summary judgment to Brunswick, Jerome Doff unequivocally stated

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[1]Jerome Doff's affidavit contained two statements on which appellants rely. In one Doff said: "It was my understanding that all of the contracts which were to be assigned to Brunswick under the Loan Agreement had either been assigned to Brunswick or were held by Brunswick in a condition for assignment. . . ." Doff does not say Transa did in fact assign the contracts; he says only that he "understands" that they did. The other statement reads as follows: "During the month of May, 1962, Transa Structures made repeated demands upon Brunswick for the balance of $130,000 which Brunswick was obligated to loan to Transa under the Loan Agreement. . . ." Appellants argue that Brunswick would be "obligated to loan" only if Transa had not committed a prior default. Appellants assert that by necessary implication they have controverted Brunswick's obligation of default by Transa.

Both these statements suffer from the same defects. They do not contain "specific facts" based on "personal knowledge" about which "the affiant is competent to testify" as required by Rule 56(e) of the Federal Rules of Civil Procedure.

that he had no personal knowledge of any of the events in regard to Transa's default.[2] For all practical purposes this admission completely devitalized his prior affidavit. The net effect is the same as if Doff never filed a counter-affidavit at the original hearing; the allegation of default was never denied.

Appellants, though, have still another string to their bow. As pointed out heretofore, appellants would not have been in default prior to May 15 if the moneys due under the nine assigned units exceeded in value the aggregate of the requested loan and the previously outstanding loans. Admittedly, if this case had proceeded to trial the Doffs would have had the burden of proving that the condition precedent requiring assignment of at least thirty units had been excused by reason of the above proviso. But on a motion for summary judgment it is the moving party who carries the burden of proof; he must show that no genuine issue of material fact exists and this is true even though at the trial his opponent would have the burden of proving the facts alleged. *Dyer v. MacDougall,* 201 F.2d 265 (2d Cir. 1952); *Plank v. Schifter,* 85 F. Supp. 397 (E. D. Pa. 1949); 6 MOORE, FEDERAL PRACTICE ¶56.15[3], at 2342 (2d ed. 1965).

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[2] "During the months of March, April, May and June, 1962, I was in the City of New York, State of New York on a combined business and vacation trip and I had *no personal knowledge of the facts* concerning the performance of Transa Structures, Inc. of its obligations under the Loan Agreement of March 21, 1962." Doff went on to say that he wanted time to locate the president and business manager of Transa because "they are the persons who have personal knowledge of the facts surrounding Transa's performance of the Loan Agreement in 1962 and it is *only* by their counter affidavits that I can establish that Transa was not in default under the Loan Agreement when demand was made upon Brunswick for the balance of the $600,000 which Brunswick was obligated to loan to Transa." (Emphasis supplied).

Concededly, had this affirmative defense been put into issue, Brunswick would have been obliged to negate. it. But nowhere did appellants raise the defense. Jerome Doff's affidavit did no more than parrot back the relevant contractual clause;[3] not once did he assert that the excusing condition had in fact occurred.

Where, on the basis of the materials presented by his affidavits, the moving party, if at trial, would be entitled to a directed verdict unless contradicted, it rests upon the opposing party at least to specify some evidence to show that such contradiction is possible. *First National Bank v. First Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962); *Gifford v. Travelers Protective Ass'n*, 153 F.2d 209 (9th Cir. 1946). The burden of coming forward with specific controverting facts shifts to the opponent. *Warren v. Lawler*, 343 F.2d 351 (9th Cir. 1965); *International Longshoremen's & Warehousemen's Union v. Kuntz*, 334 F.2d 165 (9th Cir. 1964); *Bros. Inc. v. W. E. Grace Mfg. Co.*, 261 F.2d 428 (5th Cir. 1958); *Zoby v. American Fidelity Co.*, 242 F.2d 76 (4th Cir. 1957). It is his duty to expose the existence of a genuine issue which will prevent the trial from being a useless formality. 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1237, at 171 (Wright ed. 1958). If he has a plausible ground of defense, he must assert it. *Robson v. American Casualty Co.*, 304 F.2d 656 (7th Cir. 1962); *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F.2d 871 (6th Cir. 1943), *cert. denied*, 320 U.S. 800 (1944).

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[3] "Also, a further reading of paragraph 5.2 of the loan agreement clearly indicates that there is no obligation on Transa to assign all of the contracts to Brunswick prior to May 15, 1962 if the total amount of the contracts that had already been assigned exceeded the amount of the loans."

We cannot agree with appellant's contention that the movant has the burden of proving the invalidity not only of defenses which have been put into issue but also of every defense which conceivably could be raised. Appellants fail to distinguish between the burden of proof and the burden of allegation. Had the defense been put into issue, Brunswick would have been compelled to refute it. But Brunswick need not present proof negating mere hypothetical defenses. To oppose the motion successfully, appellants were obliged to come forward and show the existence of a conflict. *United States v. Mt. Vernon Milling Co.*, 345 F.2d 404 (7th Cir. 1965). This they did not do.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1355

JEROME L. DOFF, *et al.*,

Petitioner,

vs.

BRUNSWICK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 372 F. 2d 801 (1967). A copy of the opinion is attached to the petition as Appendix "A."

Jurisdiction.

Jurisdiction is based upon diversity and upon 28 USCA 1254(1).

Question Presented.

Whether there was any failure by the United States Court of Appeals for the Ninth Circuit to read, consider or understand an affidavit and the brief of Pe-

titioner on appeal taken from summary judgment, and whether any denial of due process under Amendment V, Constitution of the United States occurred.

Constitutional Provisions.

Amendment V, Constitution of the United States, is set forth on page 2 of the petition.

Statement of the Case.

The statement of the case submitted by Petitioners goes beyond the record and is incomplete and inaccurate. The following statement is therefore necessary.

This action is upon a written guarantee executed by Petitioners to cover loans to Transa Structures, Inc. ("Transa"). The guarantee and the remaining essential facts were admitted by Petitioners' failure to respond to a request for admissions filed under Rule 36 of the Rules of Civil Procedure. [Tr. pp. 44, 45, Tr. Index p. 2 Clk. Cert.] On the basis of these admissions and after consideration of supporting affidavits filed by Respondent and a single affidavit of Petitioner Jerome Doff [Tr. p. 311] the trial court granted Respondent's motion for summary judgment. The Petitioners thereafter, on September 25, 1964, filed a request for reconsideration and a second affidavit of Petitioner Jerome Doff. [Tr. p. 342.] Reconsideration was denied. The judgment was affirmed on appeal and a petition for rehearing was denied.

Basically the petition is limited to an assertion that the Court of Appeals did not read or did not understand Pe-

titioners' latter two affidavits. These two affidavits, in effect sought to establish that Respondent breached its obligation to Transa under the loan agreement between them by not loaning an additional $130,000.00 prior to Transa's default under the loan agreement on May 15, 1962. Contrary to Petitioners' assertion, the two affidavits were fully considered by the Court of Appeals and were ineffective because:

(a) The record was clear that Respondent had no obligation to make the further loan since Transa only assigned 9 of the 30 "California Contracts" required to be assigned [Tr. p. 258, lines 10-23] under the provision of the loan agreement that:

> "In any event all of the foregoing contracts shall be assigned to Brunswick or to such other lender prior to May 15, 1962 as security for all loans hereunder." [Tr. p. 128.]

And because it affirmatively appeared that the affidavits filed by Petitioners failed to comply with the standards prescribed by Rule 56(e) of the Federal Rules of Civil Procedure. (*Doff v. Brunswick Corporation*, 372 F. 2d 801, 804; Pet. App. p. 5)

(b) It was admitted that subsequent to May 15, 1962, and subsequent to any claimed default by Respondent, additional loans were made to Transa on July 20, 1962 [Tr. pp. 26, 46, line 12], September 28, 1962 [Tr. pp. 28, 46, line 15], and October 22, 1962 [Tr. pp. 30, 46, line 18], on the

basis of written instruments signed by Petitioners in which they requested the new loans; acknowledged Respondent's full performance under the loan agreement, reaffirmed their guaranty of the loans then and theretofore made, acknowledged earlier defaults by Transa, and waived any defense under their guaranty. [Tr. pp. 49, 55, 62, 67, 74, 81, 85].

It is accordingly clear that:

1. No obligation on the part of Respondent to make additional loans existed since all of the "California Contracts" had not been assigned "prior to May 15, 1962." The failure to so assign was affirmatively established by Respondent's affidavits [Tr. p. 258, lines 10-23] and it is even now stated by Petitioners' (Pet. p. 4) that only a "portion of the sums to become due upon the California Contracts" had been assigned. Petitioners' belated reliance upon Jerome Doff's affidavit that he "personally" requested Respondent to advance these additional funds prior to May 15, 1962 (Pet. p. 9) neither eliminated the condition precedent nor could have been effective for any purpose under a contract requiring performance by Transa.

2. The "understanding" of Jerome Doff, expressed in his affidavit [Tr. p. 313, lines 6-12], was no evidence that the condition percedent had been performed by Transa since he admittedly had

"no personal knowledge of the facts" during the months of March, April, May and June, 1962. [Tr. p. 342, line 19].

3. Regardless of all that Petitioners have said, they cannot avoid, and have made no attempt to avoid, the conclusive fact that they, on at least three occasions following the alleged default by Respondent, importuned Respondent to make further loans to Transa and upon the making of these subsequent loans documented their request, their reaffirmation of the guaranty, their acknowledgment of default by Transa and their waiver of any defenses under the guaranty. [Tr. p. 45, lines 2-30; Tr. pp. 49, 55, 62, 67, 74, 81, 85.]

It is crystal clear from the opinion of the Court of Appeals that it painstakingly reviewed the claimed defenses of Petitioners and correctly found them to be factually and legally insufficient.

ARGUMENT.

Petitioners' Assertion That the Court of Appeals Did Not Read or Consider Their Evidence Is Factually False and Legally Insufficient.

With typical obliqueness petitioners do not attempt to demonstrate error in the judgment of the trial court or in its affirmance by the Court of Appeals. Instead, they are content with the unsupportable assertion that there was on the part of the appellate court a "failure to read or reasonably understand" the "written evidence" presented by Petitioners to the trial court. (Pet. p. 2.) The "written evidence" on which Petitioners rely is limited to the two affidavits of Petitioner Jerome Doff. [Tr. p. 311 and p. 342.] Both are referred to at length in the Court of Appeals opinion. References to them are found in four paragraphs of the opinion and excerpts therefrom are found in three footnotes. These references clearly show that the court understood both the virtues and the frailties of the affidavits. In short the Court of Appeals did more than an appellate court is strictly required to do.

There was ample evidence in the record to support the District Court's findings. In addition to its supporting affidavit showing Transa's default prior to May 15, 1962, Respondent's evidence showed Petitioners to have thereafter admitted Respondent's full performance under the loan agreement; to have repeatedly affirmed the guaranty; to have repeatedly waived all defenses under the guarantee, and to have admitted Transa's default. The Court of Appeals liberally construed Petitioners' counter-affidavits but held them to be totally inadequate.

The Court of Appeals clearly established that Petitioners' counter-affidavits were required to show more than demand made prior to May 15 in order to demonstrate the survival of a genuine issue. It held that Respondent was not required to submit more proof than that already in the record with respect to mere hypothetical defenses which had been raised by neither the pleadings nor counter-affidavits.

Petitioners' contention that there was a breach by Respondent prior to default by Transa was presented and considered by:

(a) The trial court on motion for summary judgment;

(b) The trial court on the request for reconsideration;

(c) The Court of Appeals on the appeal; and

(d) The Court of Appeals on the petition for rehearing.

Thus, Petitioners have had their full opportunity to present every available defense and there was no lack of due process.

The cases relied upon by Petitioners cannot be helpful to their position. *Morgan v. United States,* 298 U.S. 468, involved a ruling made by a secretary of agriculture who had neither heard the evidence nor conducted the hearing at which it was received. *National Labor Relations Board v. Botany Worsted Mills,* 106 F. 2d 263, denied a petitioner's request for an order permitting interrogatories to members of the Board for the purpose of determining the reasoning upon which their judgment was based. The Court of Appeals in denying the request adhered to the settled rule that the reasoning

process used in arriving at a decision is not subject to any due process inquiry.

There was here no denial of due process. *United States v. Morgan*, 313 U.S. 409, 422 (1941); *Owens v. Battenfield*, 33 F. 2d 753, 757 (8th Cir. 1929), cert. denied 280 U.S. 605 (1929); *Willis v. Scott*, 40 F. 2d 330, 333 (10th Cir. 1930), cert. denied 282 U.S. 877 (1930).

Conclusion.

Petitioners were capably represented by counsel throughout proceedings held before the District Court and had the assistance of counsel on at least one brief filed with the Court of Appeals (Pet. for Rehearing p. 5). Moreover, Petitioner Jerome L. Doff is a member of the State Bar of California. [Tr. p. 220.] The petition shows no conflict of decision among courts of appeals nor does it raise or demonstrate the existence of an important question of federal law. The opinion of the Court of Appeals refutes the assertion that it failed to read any evidence or give consideration to any argument. The petition and the record are totally devoid of any showing of due process violation. The petition should be denied.

Respectfully submitted,

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